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THE RELEASE OF SOUTH AFRICA'S POLITICAL PRISONERS: DEFINITIONS AND EXPECTATIONS

by

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INTRODUCTION

On 2 February 1990, South African State President F. W. de Klerk announced a variety of initiatives designed to create a situation that "places everybody in a position to pursue politics freely". Amongst others, he announced that:

"People serving prison sentences merely because they were members of one of the [previously banned] organizations, or because they committed another offence which was merely an offence because a prohibition on one of the organizations was in force, will be identified and released. Prisoners who have been sentenced for other offences such as murder, terrorism or arson are not affected by this."

While President de Klerk's statement does not use the term "political prisoner", international media has interpreted it as a response to one of the preconditions for negotiations set by the African National Congress of South Africa (ANC) in the Harare Declaration ^{1/} and endorsed by both the Organization of African Unity (OAU) and the United Nations General Assembly. Specifically, by consensus, the General Assembly stated that "it is essential that ... [the South African Government] respond positively to this universally acclaimed demand" and, *inter alia*, "release all political prisoners and detainees unconditionally and refrain from imposing any restrictions on them". ^{2/}

President de Klerk's announced prisoner release falls far short of this international requirement. His initiative is limited to those political prisoners convicted of affiliation with or furthering the aims of a banned organization. The South African Bureau of Prisons has estimated that only 77 individuals would be released based on that standard. ^{3/}

In contrast to the limited numbers affected by President de Klerk's reforms, the Human Rights Commission in South Africa estimated that there are currently approximately 350 prisoners serving sentences for convictions under South Africa's security legislation and common law charges, such as treason. There are also approximately 2,500 to 3,000 prisoners convicted of unrest-related offences such as "public violence", arson, and malicious damage to property. Further, the Commission adds that approximately 80 "death row" prisoners have been convicted of murder involving some form of political motivation.

In addition, there are a number of people who are being detained without charge or trial under regulations issued pursuant to the state of emergency and various provisions of the Internal Security Act. While President de Klerk's initiatives set a limit on the length of detentions under the state of emergency regulations, it did not release those or other detainees.

Given the narrow impact that President de Klerk's speech has had on the continued detention and imprisonment of political activists, it is important to weigh his initiatives against international legal norms and the expectations of the international community as expressed in the United Nations Declaration. State practice relating to extradition treaties and amnesties provides the best source from which to formulate a widely accepted definition of political prisoners.

An examination of State practice, including that of South Africa, leads to a broader definition of the political prisoners status than the one on which

President de Klerk appears to be acting. That definition would include all those gaoled because their political beliefs, associations or deeds are considered a threat to State security, including all those who acted with political motives or during and as part of some form of uprising. Even those crimes that are simply related to, as opposed to being in strict pursuit of, political goals are deemed to be within this category if there is a preponderant political motivation. These norms do not judge the validity of the political motivation or of the tactics. Rather, the mere existence of the antagonism between individual and government may be sufficient to call the person a political offender.

Under these norms then, President de Klerk should have included the release of several additional categories of prisoners:

- (a) Those who have been convicted under the Internal Security Act 4/ or its predecessor legislation; 5/
- (b) Those convicted of the common law crimes of treason, sedition, and related offences under the Explosives Act 6/ and the Arms Ammunitions Act; 7/
- (c) Those convicted of common law crimes that are politically related;
- (d) Under qualified circumstances, those convicted of offences under the Explosives Act and the Arms and Ammunitions Act;
- (e) Those convicted of violating the state of emergency regulations; 8/
- (f) Administrative detainees held under the detention provisions of the Internal Security Act or the state of emergency regulations.

Under South Africa's fiction of homeland independence, the Transkei, Ciskei, Venda and Bophuthatswana each have legislation similar, and at times identical, to that discussed in this paper, that has been used to incarcerate opponents of apartheid. Prisoners held under those laws must also be released.

DEFINITION ACCORDING TO EXTRADITION TREATIES

Since the mid-nineteenth century, there has been a political offence exception to most bilateral extradition treaties. According to the exception, individuals are held non-extraditable if they are charged with a political offence. State interpretations of the exception vary. Nevertheless, State practice under extradition treaties demonstrates a significant degree of consensus on the type of offences that fall within the definition and the factors that must be assessed in making the determination.

Generally, the political offense exception includes:

- (a) The "pure" political offences, including offences of opinion or expression;
- (b) "Relative" political offences that involve some act, usually violent, motivated by political goals. 9/

"Pure" political offences are most generally accepted as falling within the extradition exception. They include those acts "aimed directly at the government and hav[ing] none of the elements of ordinary crimes"; typical examples are treason, sedition and espionage. 10/ Different countries use different tests for the "relative" political offences.

South Africa has adopted the political offence exception to extraditions. 11/ In interpreting this, South African courts have followed certain legal developments in other common law countries such as the United Kingdom of Great Britain and Northern Ireland and the United States of America.

Those United Kingdom precedents followed by South African courts recognize not only offences that are "purely" political but also offences pursued for a political purpose or having political consequences. 12/ In Ex parte Rolff, 13/ the South African court held that it might be said broadly that a political offence is one committed in the course of some political disturbance and in furtherance of its objects. 14/

The full bench of Natal Provincial Division held in S. vs. Devoy, 15/ that the "political incident" test adopted in United Kingdom cases should be applied in South Africa. 16/ The Court expressly referred to two leading English cases, In re Castioni 17/ and R. vs. Governor of Brixton ex parte Kolczynski and others. 18/

In re Castioni involved the shooting of a government official during an uprising in the Swiss canton of Ticino. The opinions of the court were the first formulation of the "political incident" test which still generally governs in both the United Kingdom and the United States: 19/

"[f]ugitive criminals are not to be surrendered for extradition crimes, if those crimes were incidental to and formed a part of political disturbances". 20/

The case also set a precedent for a nonjudgemental approach to defining political offences:

"(t)here are many acts of a political character done without reason, done against all reason; but at the same time, one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement. We know that in heat and in heated blood men may often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over". 21/

This nonjudgemental attitude on the part of judges has been reiterated in United States cases. 22/

As cited by South African courts, the "political incident" test was further developed in the United Kingdom in R. vs. Governor of Brixton ex parte Kolczynski and others. This case involved seven Polish sailors who used force to seize control of a Polish ship in order to seek asylum in the United Kingdom. In this case, the sailors were not part of a political movement, nor was there really an incident as in In re Castioni. Nevertheless, the Court

ruled in favour of the sailors, recognizing that they shared with their fellow citizens a widespread hostility toward the current Polish Government. As a later United States case notes, in Kolczynski, "the only indispensable ingredient is that the act be politically motivated and directed towards political ends". 23/

In summary, extradition law provides some of the most important resources for defining political prisoner status. This is primarily through State judicial interpretations of the political offence exception. Although there is no single definition available regarding political offences, there are some broadly shared principles. All definitions agree that political offences are not limited to those involving solely anti-government opinions or non-violent expressions; acts which involve common law or statutory crimes can also be deemed political.

In those situations, a number of factors must be evaluated. Firstly, the motive of the perpetrator must be assessed. 18/ Secondly, the context in which the act was committed may be considered. Was the offence committed in the context of a political incident or uprising? 24/ Thirdly, the relationship between the offences and the political goal may be considered, to evaluate "remoteness". 25/

With a few exceptions, courts have held that the determination should be done objectively without subjective judgement being rendered on the worthiness of the motive or the tactics. 26/ The violent nature of the act does not rule it out as a political act; indeed, the most important common law case involved the shooting of a government official. 27/ Also, an uprising, and any offences arising out of it, can still be deemed political even if the uprising lacks organizational structure. 28/ South African courts follow United Kingdom development in this regard.

NAMIBIAN PRECEDENTS

The definition of political offence described above, which was extracted from South African domestic law, and that of other countries, has been applied in Namibia to determine who in that country would be considered political prisoners eligible for release under the United Nations settlement plan.

Under the process mandated by United Nations Security Council resolution 435 (1978) of 29 September 1978, leading to elections and independence in Namibia, the Administrator-General was obligated to release "all Namibian political prisoners or political detainees held by the South African authorities ..." 29/ prior to commencement of the election campaign. Disputes concerning the release or identification of eligible prisoners were to be resolved on advice of an independent jurist designated by the Secretary-General of the United Nations.

The decisions regarding political prisoner status in the Namibian context should be given particular weight in the present consideration. The South African Government has been the detaining Power in both situations. The laws under which prisoners were convicted in Namibia are largely the same as those under which South African prisoners have been convicted. A similar variety of activities have formed the basis of offenses for which the Namibian and South African prisoners were convicted. And, the agreement to release Namibian

political prisoners was a critical step in a negotiated settlement that in several respects is being seen as a model for South Africa. If, on a case-by-case examination, the release of certain categories of prisoners in Namibia was deemed necessary to create the political climate conducive to free and fair elections, the release of those same categories of prisoners would be necessary to create a climate for a negotiated settlement in South Africa.

The status of 38 prisoners was considered in Namibia. With respect to 17 of them, the Administrator-General, representing the South African Government, conceded without contest the political nature of their offences. These were prisoners whose charges fell primarily under security legislation, namely the Terrorism Act. They were members of the armed military wing of the South West Africa People's Organization (SWAPO) and the activities that led to the convictions were within the course and scope of their duties as such. The Administrator-General also made concessions with respect to three additional prisoners.

After hearing arguments and receiving submissions on the status of the other prisoners contested by the Administrator-General, the independent jurist appointed by the Secretary-General, Professor C. A. Norgaard, 30/ advised that 10 additional prisoners be released under the political prisoner provisions of the settlement plan. The release included prisoners convicted of common law charges.

For example, Mr. Angula Mwaala, whose release was advised by Professor Norgaard, had been sentenced for murder, robbery and contravening section 2(c) of the Terrorism Act. He was a member of SWAPO's armed wing and was an accomplice to a murder related to his activities as an insurgent. Norgaard considered the murder in that case to be a political offence because of a connection between the deceased and the security forces. Acts of sabotage (bombings of buildings and facilities) were also considered political even when the attack was on private property if politically motivated and if a connection could be made between the target and the political aim pursued. 31/

Professor Norgaard's decision to release five prisoners 32/ convicted of public violence offences arising out of a school boycott in Walvis Bay is of particular note. The Regional Magistrate found that the defendants had committed public violence by disrupting the writing of examinations at the Kuisebmond Secondary School, Walvis Bay, and had either thrown or associated themselves with the throwing of stones at the school or at police vehicles on 10 June 1988.

On that day, a group of students of the Kuisebmond Secondary School had decided to participate in the national school boycott. They had gathered in a group to mobilize fellow students to join with them. The group had proceeded to certain classrooms at the school and disrupted examinations, with some members of the group entering a classroom and tearing up examination papers. After some time, the group had been violently dispersed with whips by the police. Stones had been thrown by students at the school and at police vehicles, causing a total damage of approximately R 2,000.

The Administrator-General had conceded that the disturbances had a political objective but had submitted that the particular offences could not be considered political since they had been primarily directed against the scholars and teachers and not against a State institution. 33/ The targets

attacked had, in his view, been too far removed from the South African authority in Namibia.

Professor Norgaard concluded that the students were eligible for release. His advice regarding the Walvis Bay students has not as yet been made public. It can be speculated, however, that he reasoned that although the students' actions may have only indirectly targeted the Government, they were sufficiently calculated to create pressure for change in South Africa's policies toward Namibia.

DEFINITION UNDER SECURITY LEGISLATION

All prisoners held under the administrative detention provisions of security legislation or convicted for offences under such legislation ipso facto are political prisoners. 34/ South Africa's security legislation was enacted for indisputably political purposes: to control opposition to government policies and practices and thereby "provide for the security of the State". John Dugard writes with reference to trials under security legislation that the "main purpose of the political trial is to eliminate or discredit a political opponent according to established rules". 35/

At the same time, by charging a defendant under security legislation, the State acknowledges the political motivation of the accused. The statutory definitions of offences under the Internal Security Act, No. 74 of 1982 (terrorism, subversion, sabotage and promotion of communism), emphasize a finding of political intent on the part of the accused, for example, to "overthrow or endanger the state authority", 36/ "promote any constitutional, political, industrial, social or economic aim or change", 37/ "to induce the Government ... to do or abstain from doing any act ...", 38/ "to advocate, advise, defend or encourage the objects of communism", 39/ etc.

Additionally, the priority placed on the interests of State security in trials under security legislation has been used to justify the extraordinary procedural advantages created for the prosecution under the Internal Security Act, which are not available in ordinary criminal trials and which offend most basic principles of due process. The right of an accused to be informed of the charges, to have legal counsel and an expeditious trial are all denied by statutory provisions that authorize long term incommunicado detention without charge or trial. Sections 29 and 31 of the Internal Security Act authorize detention for interrogation purposes and of potential State witnesses. Much of the evidence presented in subsequent trials is based on statements made in detention or evidence of alleged accomplices of the accused who have themselves been held in incommunicado detention. Section 28 authorizes the detention of persons when there is an alleged suspicion that the person is likely to commit an act endangering the maintenance of law and order.

In concluding that these detention powers were essential, the South African Government-appointed "Rabie" Commission of Inquiry into Security Legislation stated that "(i)nformation obtained from persons in detention is most important, and to a large extent, the only weapon of the Police for anticipating and preventing terroristic and other subversive activities". 40/

The Internal Security Act grants additional procedural advantages to the State. The scope of judicial inquiry and review is narrowly circumscribed by

statute. Security legislation expressly excludes judicial review of administrative actions authorized by its provisions, such as detention without trial. Security police, not the courts, make the final decision as to who should be removed from society when there is a claim that State security is at issue. In these circumstances, therefore, the question of individual freedoms is reserved for the police and the executive but denied to the courts. Furthermore, when charges are brought, the court's discretion to grant bail can be precluded by the attorney-general 41/ only in such political trials.

Under security legislation, the international standard of presumptive innocence is turned on its head. With certain offences (terrorism, subversion), once the State has proved the commission of certain acts likely to have furthered one of a series of widely phrased aims, the onus is on the accused to prove beyond reasonable doubt that she/he lacked the requisite political intention, thereby shifting the burden of proof.

The Public Safety Act, No. 3 of 1953, empowers the State President to declare a state of emergency when he considers it to be in the interests of "the safety of the public, or the maintenance of public order" to do so. 42/ It is under the authority of this statute that five successive states of emergency have been declared since 1985 in South Africa. While neither the statute nor the regulations issued pursuant to it use the words "security of the State" or "internal security", there can be little question that the sweeping powers authorized under the states of emergency have been employed as weapons against various forms of political dissent.

The Public Safety Act was passed in 1953 in order to put an end to a passive resistance campaign promoted by ANC against discriminatory legislation. 43/ A state of emergency was first declared under it in 1960 in the wake of the police shooting of people demonstrating at Sharpeville against the requirement to carry passes. The provisions for detention without charge or trial that have been promulgated under the states of emergency imposed since 1985 as well as the substantive prohibitions and other unfettered executive powers granted by those regulations mirror substantially those in the Internal Security Act. Under regulation 3(1):

"a member of a Force may, without warrant of arrest, arrest or cause to be arrested any person whose detention is, in the opinion of such member, necessary for the maintenance of public order or the safety of the public or the person himself, or for the termination of the state of emergency and may, under a written order signed by any member of a force, detain, or cause to be detained, any such person in custody in a prison."

The regulations prohibit the making, possession or dissemination of subversive statements - defining "subversive" so widely as to cover virtually any criticism of the status quo; they give power to outlaw and seize any publication deemed by the State President to threaten the interests of the State; they prohibit the publication of any information about police activities in relation to any "unrest" incident; they grant an indemnity to members of the security forces against criminal or civil liability arising out of unlawful acts (provided only that they cannot be proved to have been done in bad faith); and they purport to oust the jurisdiction of the courts to adjudicate on the lawfulness of the regulations or anything done in reliance on them. 44/

And, perhaps most conclusive is the clear evidence that its enforcement has targeted political activists. For example, during the second half of 1987 approximately 78 per cent of the recorded 2,346 detainees held under the state of emergency regulations were members of the United Democratic Front (UDF) and its affiliates. 45/

There should be little doubt that those detained or serving sentence for conviction for an offence under the Internal Security Act or state of emergency regulations issued pursuant to the Public Safety Act should be considered political prisoners.

COMPARATIVE AMNESTY LAWS

Apart from domestic legal interpretations of bilateral extradition treaties, useful evidence of a widely accepted definition of political prisoner status exists in various amnesties granted recently by Governments to political prisoners. Although the present paper is not the place for a comprehensive study of such amnesties, it is helpful to look at three recent amnesties as evidence of state practice. The amnesties considered below are those that occurred in the Philippines in 1986, in El Salvador in 1987 and in Namibia in 1989.

Other amnesties have of course occurred. As in Uruguay in 1986, these have sometimes focused on forgiving security officers for their past alleged human rights violations. 46/ Thus, they are less useful in working towards a definition of the political prisoner status. The Philippine and Salvadorian amnesties both reflect the broad concept of the political prisoners elaborated in the context of extradition treaties discussed above. In both cases, those convicted of "relative" crimes (as the term is used above) were released. Both the Philippine and Salvadorian amnesties included those who had participated in armed struggle.

On 2 March 1986, by proclamation No. 2, the Philippine Government reinstated the writ of habeas corpus, which had been previously suspended. In June 1986, resolution No. 3 clarified the order and announced that this was a dismissal of pending cases and a granting of freedom to political prisoners. The Government announced that a total of 563 prisoners had been freed, including alleged leaders of the New People's Army (NPA) and the Communist Party (CPP). The most notable was Commander "Dante", founder and leader of NPA.

Besides these armed insurgents and those convicted solely for their political beliefs, questions arose regarding those who had been convicted of common law crimes but who alleged that they had acted with political motivation. In August 1986, guidelines for the release of political prisoners were issued by the Presidential Committee on Political Detainees/Prisoners of the Ministry of Justice. These guidelines stated that the following were deemed political prisoners:

(a) Those charged, detained or imprisoned for the commission of any of the following crimes/offences:

- (i) Treason;

- (ii) Conspiracy or proposal to commit the crime of treason;
- (iii) Misprision of treason;
- (iv) Rebellion or insurrection;
- (v) Conspiracy and proposal to commit rebellion;
- (vi) Disloyalty of public officers and employees;
- (vii) Incitement to rebellion or insurrection;
- (viii) Sedition;
- (ix) Conspiracy to commit sedition;
- (x) Incitement to sedition;
- (xi) Acts tending to prevent the meeting of the National Assembly;
- (xii) Illegal assemblies, if meeting is one in which the audience is incited to the commission of the crime of treason, rebellion or insurrection, sedition or assault upon a person in authority or his agent;
- (xiii) Espionage;
- (xiv) Subversion;
- (xv) Unlawful rumor-mongering;

(b) Those charged, detained or imprisoned for any crime/offence other than those enumerated in paragraph (a) above, committed in connection with, or by reason or in furtherance of the same;

(c) Those charged, detained or imprisoned by reason of their political beliefs or resistance to the immediately preceding government/administration.

Note how paragraph (b) includes prisoners convicted of "relative" political offences as well as "pure" ones in line with extradition treaty doctrine discussed above. The Presidential Committee was empowered to review individual cases appealing for political prisoner status and amnesty. By the end of 1986, it had reviewed 90 cases, of which 15 were recommended by the Committee for release. 47/

On 28 October 1987, the Legislative Assembly of El Salvador passed an amnesty decree, decree No. 805. The decree granted amnesty to:

"all those persons, citizens or foreigners, who have participated as immediate authors, intermediate authors or accomplices, in the commission of political crimes or common crimes connected to political crimes or common crimes when in their execution no fewer than 20 persons intervened, committed until 2 October of this year." 48/

For additional detail, the decree lists certain articles of the Penal Code, violations of which are covered by the amnesty. Included are:

(a) Organizing or promoting violence against the political, judicial, economic and social order; 49/

(b) Committing acts of terrorism using explosives and dangerous weapons; 50/

(c) Armed attacks on military installations. 51/

The decree also includes amongst political crimes:

"the crimes committed by any person for motive of, because of, by reason of or as a consequence of the armed conflict, without taking into consideration their militancy, membership or political ideology or belonging to one or the other of the sectors involved in that conflict." 52/

Four aspects of the Salvadorian amnesty should be noted. First, it reiterated the political offence doctrine in extradition law by including related or connected common law crimes. Secondly, it granted amnesty to all those who had committed common law crimes in groups of 20 or more. 53/ Thirdly, it specified that political offences would be determined neutrally with no concern given to the validity of the cause to which the prisoner belonged. 54/ Finally, those convicted of participation in the armed conflict were included.

On 6 June 1989, the Administrator-General of Namibia issued an amnesty decree 55/ as required under the terms of Security Council resolution 435 (1978). The amnesty applied to the refugee community only and covered "any criminal offence committed by such person in the Territory or elsewhere at any time before the said date". 56/ While no further detail was given in the Proclamation about the specific offences covered by the amnesty, in practice it was applied to returning members of the People's Liberation Army of Namibia (PLAN), the armed wing of SWAPO.

SOUTH AFRICAN POLITICAL PRISONERS

There are currently between 2,500 and 3,000 people incarcerated in South Africa who should be considered when determining eligibility for release as political prisoners. A case-by-case evaluation of each prisoner's status is, of course, beyond the limits of this paper. Some broad classifications, however, can be discussed.

There are currently between 75 and 100 individuals who are being held as detainees under provisions in the Internal Security Act and the state of emergency regulations which allow for detention without charge or trial for reasons related to the security of the State. 57/ As the legal director of the International Committee of the Red Cross (ICRC) has said, "When detention is the result of an administrative decision, without any charge being preferred and without trial, there is no room for doubt" that the individual is a political prisoner. 58/

They should all be released immediately.

With respect to individuals who have been charged, tried and sentenced, their convictions have been based on their involvement in four broad categories of alleged activities. Those categories are discussed below and evaluated on the basis of the definition of political offence developed above.

Public or semi-public politicizing and consciousness-raising activity where no specific acts of violence are alleged, including boycotts, stayaways and participation in demonstrations, protests and campaigns

Offenders in this category are usually charged under the Internal Security Act 59/ with subversion; 60/ furthering the aims of a banned organization; 61/ possession or distribution of banned literature; 62/ advocating the objectives of communism; 63/ violating restrictions placed on individuals; 64/ convening, advertising and/or attending an illegal gathering; 65/ and/or incitement to commit an offence. 66/ Another statutory charge used for this category of offences is intimidation, under the Intimidation Act. 67/ In addition to statutory offences, people engaging in activities that fall in this category are often charged with the common law crimes, such as treason, sedition and intimidation.

A prominent trend among these trials has been to prosecute important community leaders on tenuous charges involving allegations of conspiracy with ANC. Often the activities forming the basis of the charges have included: forming residents and civic associations; launching rent and consumer boycotts against State-appointed township councils and local businesses; creating informal judicial structures known as "people's courts"; and campaigning to get the South African Defence Force (SADF) to withdraw from the townships. These mass-based activities have been characterized as undermining and supplanting existing governmental structures. This alleged subversion of State rule has been deemed treasonous. In most cases these same activities constitute violations of certain regulations issued under the state of emergency.

There can be little doubt that prisoners convicted of offences in this category constitute political prisoners. Considering extradition law doctrine, for example, many of the charges fall within the "pure" political offence category. Indeed, treason and subversion have been considered by many commentators as the primary examples of "pure" political offences. 10/ The political motive is clear and the actions are either aimed directly at the South African Government or are clearly designed to affect it. Also, as discussed above, by charging individuals under security legislation, as many in this category have been charged, South Africa should be deemed to have conceded the political nature of the offence.

Largely spontaneous attacks on property or individuals which were perceived as symbols of oppression (e.g., State-run inferior schools or other official buildings, township officials appointed under the Black Local Authorities Act, small shopkeepers with a reputation for gross exploitation of African township dwellers, members of the security forces, suspected informers, etc.)

Commonly, those arrested for activities of this type have been charged with common law offences: public violence, arson, malicious damage to property, attempted murder and murder.

This is perhaps the most difficult category about which to make generalizations. The range of activities falling into this category is very broad. In some cases, the prisoners may have been charged with public violence for participation in a school boycott which disrupted classes. In other cases, the accused may appear to have been arrested randomly during township-wide police sweeps following security force actions against demonstrators or mourners at funerals. At times, the accused in this category may have been arrested in the context of a general political uprising in a township. Deaths may have occurred, and large numbers of persons merely present during a melee may have been arrested and charged with murder. In a number of such cases, convictions have been based on a tenuous expansion of the theory of "common purpose" which attributes criminal responsibility to many in the crowd who may have had no causal connection to the death. Death sentences have been imposed pursuant to convictions based on that theory.

A careful case-by-case assessment is most important in determining the status of prisoners in this category. As established above, South African law recognizes that offences that, on their face, appear to be of a non-political nature, may be considered political offences in certain circumstances. Violence will not ipso facto preclude the offence from being considered political. To quote Van den Wijngaert, "related political offences", may be defined as: "in se common crimes which are assimilated to political offences because the perpetrator pursued a political purpose [subjective criterion] or because the act had political consequences or was situated in a political context [objective criterion]". 68/

The factors to be considered with regard to each case are:

- (a) The motivation of the prisoner, specifically whether the offence was committed for a political motive;
- (b) The context and circumstances in which the offense was committed, whether it was committed as part of a political uprising or a dispute of a political nature or within the context of protest against the Government;
- (c) The relationship between the offence and the political objective pursued by the perpetrator.

The child in the township who is convicted of public violence for throwing stones at security force personnel meets these standards. The scholars who disrupted classes meet the tests. 69/

The case of township residents who attacked officials appointed under the Black Local Authorities Act or suspected government informers requires more analysis. It can be argued, however, that they, too, fall within the scope of the definition of political prisoners. First, unless specific evidence to the contrary can be presented in each case, their motivation would appear to be political in nature: opposition to apartheid and the structures created on the township level to implement apartheid. Secondly, the offence was committed in the context of a political uprising or protest against the Government. Sometimes such events occurred during a melee when security forces violently disrupted a march, demonstration or funeral.

Thirdly, the relationship between the act and the political objective must be considered. The relationship between the two should not be remote. The

act must be recognizably incident to the political motive and disturbance or uprising. It is not sufficient that the acts were merely committed during the disorder. Indiscriminate, wanton or reckless endangerment of civilians is not excused. Often, however, the political affiliation or governmental or military status of the targets or victims is considered.

In the Namibian context, for example, Professor Norgaard concluded that an attack on a petrol pump, even though it was owned by a civilian, could be considered political because of the implications for the transport infrastructure of the country; 70/ the murder of a suspected informer may have been political; 71/ the attempted murder of a police officer was political; 72/ and the murder of a farmer who had collaborated with security forces could also be considered political.

Common law offences in these situations may be considered politically-related. They arise out of the township political unrest generated by the hardships of or opposition to apartheid. In those cases where regrettably murders occurred, the victims, often township councillors, had become the focus for the community rage against the implementation of apartheid through local surrogates. The motive in killing these individuals was political: antipathy towards apartheid and all those who support, represent and benefit from that system.

When there has been a finding that the requisite relationship existed between the offence and the political objective, both English and South African courts have taken an otherwise non-judgemental approach. Courts generally agree that the methods used in such uprisings should not be judged according to moral worth. 73/ In particular, one member of the Castioni Court wrote that "one cannot look too hardly and weigh in golden scales the acts of men hot in their political excitement". 74/ In re Castioni is followed by the South African courts. 75/

Recruitment of people for military training and their transportation out of South Africa and/or the harbouring of such combatants

The charges against Nelson Mandela fell in this category. 76/ Offenders in this category are generally charged under the Internal Security Act with terrorism; 77/ subversion; 78/ sabotage; 79/ harbouring and assisting; 80/ and undergoing training. 81/ They are charged with supporting the armed struggle against the South African Government but without carrying out military activities themselves. The motivation of people charged in this category is unquestionably political. Their actions take place in the context of an armed struggle to overthrow the Government. Both the Philippine and Salvadorian amnesties would have included this category of prisoners: the Philippine amnesty under "(a) (4) Rebellion or insurrection", and the Salvadorian amnesty under "Rebellion or insurrection", under "the crimes committed by any person for motive of, because of, by reason of or as a consequence of the armed conflict".

Activities that in essence constitute acts of war or sabotage committed generally, but not necessarily, by trained combatants, often involving arms, explosives and ammunition

The accused in this category are usually charged under the Internal Security Act with terrorism, subversion or sabotage and under the Arms and

Ammunitions Act, ^{82/} or the Explosives Act. ^{83/} Depending on the circumstances, they may also be charged with murder, attempted murder, arson and malicious damage to property.

As has been established earlier, their participation in acts of violence does not preclude these prisoners from being considered political. The acts for which they have been sentenced arose out of their attempts to overthrow the apartheid State.

In the context of Namibia, the independent jurist had no difficulty concluding that certain acts were political offenses when committed by members of PLAN, the military wing of SWAPO, or under their instructions, when the act was in furtherance of their political goals and when there was a relationship between the target of an attack and the political goals.

Members of armed opposition have been included in amnesties in many other countries. Most notable for the present case is the Namibian example, where SWAPO combatants were granted amnesty to repatriate. Armed combatants were also included in the Philippine and Salvadorian amnesties. The former included them under those who had participated in "rebellion or insurrection". The latter included them under "the crimes committed by any person for motive of, because of, by reason of or as a consequence of the armed conflict, without taking into consideration their militancy, membership, political ideology or belonging to one or the other of the sectors involved in that conflict".

Furthermore, the South African Government has already conceded special status to prisoners convicted because of armed opposition to the State. For the most part, they are held with other political prisoners in facilities, such as that on Robben Island, separated from non-political prisoners. For several years, representatives of ICRC have been allowed to visit prisoners serving sentences on Robben Island without distinction based on the violent or non-violent character of their offenses. ^{84/} The aims and objectives of ICRC, to create a measure of humanitarian protection to political prisoners and detainees as well as prisoners of war, are well known. It is submitted, therefore, that by allowing ICRC to visit prisoners in this category the South African Government has recognized the political nature of the offences for which they were convicted.

Finally, while State practice to date has been insufficient to conclude that Additional Protocol I to Geneva Conventions of 1949 ^{85/} constitutes customary international law binding on South Africa, its clearly stated provisions and the travaux preparatoires ^{86/} are evidence of international expectations that captured combatants who engaged in armed struggle against apartheid should be accorded a special status as prisoners.

Notes

1/ Declaration of the Organization of African Unity (OAU) Ad-hoc Committee on Southern Africa on the Question of South Africa, adopted at Harare on 21 August 1989.

2/ Declaration on Apartheid and its Destructive Consequences in Southern

Africa, adopted by the General Assembly at its sixteenth special session, resolution S-16/1 of 14 December 1989, annex, paras. 5 and 6 (a).

3/ Those prisoners convicted on multiple charges, certain of which do not fall within the parameters of the release, will only have their sentences reduced.

4/ The Internal Security Act, No. 74 of 1982 is permanently in force (including and especially during periods when no state of emergency has been declared) and confers wide powers of detention without trial, banning of persons, organizations, gatherings, publications, etc. It has been in force, in one form or another, since 1963, and is fully operational at the present time. All the so-called "independent" homelands have their own versions of the Internal Security Act, which are virtually indistinguishable from the parent.

5/ The Terrorism Act, No. 83 of 1967; the Internal Security Act, No. 44 of 1950; the Sabotage Act, No. 76 of 1962; the Unlawful Organizations Act, No. 34 of 1960; and the Criminal Law Amendment Act, No. 8 of 1953.

6/ No. 26 of 1956.

7/ No. 75 of 1969.

8/ The Public Safety Act, No. 3 of 1953, enables the declaration of a state of emergency to be made granting even wider and more unbridled powers, capable of use on a mass scale. Partial states of emergency were declared in 1960 and 1985 and national states of emergency were declared in 1986, 1987, 1988 and 1989, extending uninterruptedly from 12 June 1986 up to and including the present time.

9/ M. C. Bassiouni, International criminal law, 414, vol. II, 1986. See also generally I. A. Shearer, Extradition in international law, 1971, chap. 7.

10/ Quinn vs. Robinson, 783 F.2d 776, 793-794 (9th Cir. 1986). See also Evans, "Reflections upon the political offence in international practice", 57, American Journal of International Law, 1 November 1963.

11/ Extradition Act, No. 67 (1962). See also Lawsa, Edition Joubert, vol. 10, p. 151; and Lansdowne and Campbell, South African criminal law and procedure, vol. 5, p. 32, et seq.

12/ Ex parte Rolff, 109 (26) SC 433.

13/ Van den Wijngaert, The political offence exception to extradition, pp. 108-111; see also Schtraks vs. Government of Israel, 1962 (3) ALL ER 529 at 534 (per Lord Reid).

14/ Ex parte Rolff, op. cit., p. 439.

15/ S. vs. Devoy 1971 1 S.A. 359(N). The "political incident" test has been followed in the United States since In re Ezeta, 62 F. 972 (N.D. Cal., 1984): a political offence was deemed in that case to be "any offence committed in the source of or furthering of civil war, insurrection or political commotion" (para. 978). The test was recently reiterated in Quinn

vs. Robinson, 783 F. 2d 776 (9th Cir., 1986) (case involving an alleged member of the Irish Republican Army accused of complicity in a series of bombings and a murder; extradited on grounds unrelated to the issues presented by South African prisoners and detainees. While the acts were deemed political, they were not felt to be "incident to" an uprising since they occurred in England and not in Northern Ireland).

16/ S. vs. Devoy, op. cit., p. 363.

17/ In re Castioni (1891), I.Q.B. 149.

18/ R. vs. Governor of Brixton ex parte Kolczynski and others (1955), I.Q.B. 540.

19/ Recent developments have altered the law in the United Kingdom and its relationship to the United States. Because of British dissatisfaction with the applicability of the political offence exception in cases involving the Irish Republican Army, particularly when United States courts used the "political incidents test", the United Kingdom negotiated with the United States a new treaty that narrows the definition of political offence, making practically any act of violence extraditable. The United Kingdom also recently passed a new extradition law that also narrows the scope of exceptions. These recent developments do not, however, affect the doctrine applicable in South African law. The South African Extradition Act, No. 67 (1962), is modeled on the earlier British statutes and British case law which interpreted them. Of course, the new United States-United Kingdom Supplementary Extradition Treaty affects only relations between those two States. The Supplementary treaty concerning the extradition treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America, signed at London on 8 June 1972, and at Washington on 25 June 1985. It supplements the Treaty on Extradition between the United States and the United Kingdom of 8 June 1972, entered into force on 21 January 1977, 28 United States Treaties 227, Treaties and other international agreement series, No. 8468.

20/ In re Castioni, op. cit., J. Hawkins, p. 159.

21/ Ibid., para. 157.

22/ In Quinn vs. Robinson, op. cit., the Court stated that one cannot judge the organizational structure of a group, since so many uprisings are inherently informal: "... it is entirely possible to sympathize with, aid, assist, or support a group, [and] help further its objectives ... without becoming a member of the organization. Still, one may be acting in furtherance of an uprising" (p. 809). The Court added that one cannot judge the merits of the uprising or its tactics: "... it is not our place to impose our notions of civilized strife on people who are seeking to overthrow the régimes in control of their own countries in contexts and circumstances that we have not experienced and with which we can identify only with the greatest difficulty (pp. 804 and 805).

23/ In re Gonzalez, 217 F.Supp. 717, 721 n9 (S.D.N.Y. 1963) This emphasis on motive was repeated in a later United Kingdom case, Schtraks vs. Government of Israel (1962) 3 ALL E.R. 529.

24/ See In re Castioni, op. cit.; and Kolczynski, op. cit., Lord Goddard, p. 550.

25/ See Cheng vs. Governor of Pentonville Prison (1973), A.C. 931, Lord Diplock, p. 945.

26/ See In re Castioni, op. cit. and Quinn vs. Robinson, op. cit.

27/ See In re Castioni, op. cit. Some authorities rule out perpetrators of violent acts. For example, the United Nations Commission on Human Rights recently stated that political prisoners were those detained "for seeking to exercise peacefully their human rights and fundamental freedoms, in particular the rights to freedom of expression, of assembly and of association". (Commission on Human Rights resolution 1988/39.) It should be noted that such a resolution does not by itself create binding international law.

28/ See Quinn vs Robinson, op. cit.

29/ Proposal for a settlement of the Namibian situation, S/12636 of 10 April 1978, para. 7(b), p. 3. Incorporated by reference into Security Council resolution 435 (1978).

30/ Professor Norgaard, a national of Denmark, is President of the European Commission on Human Rights.

31/ See, for example, the applications of Silas Mbonge, Paulus Andreas, Afunda Nghuyolwa and Leonard Sheehama.

32/ Johanna Kambanda, Mingeli Erastus, Paulus Shimbanda, Rosalia Shipiki and Diinina Nakwafila.

33/ A jurisdictional issue was also raised relating to the status of Walvis Bay.

34/ In State vs. Budlender (1973) 1 SA 264 C, p. 268, the court regarded a contravention of the Riotous Assembly Act, No. 17 of 1956, to be a "political offence".

35/ John Dugard, Human rights and the South African legal order, 1978, p. 206.

36/ Sect. 54(1) (a).

37/ Sect. 54(1) (b).

38/ Sect. 54(1) (c).

39/ Section 55.

40/ The report of the commission of the Inquiry into Security Legislation, 1982, paras. 14.5 and 10.78.

41/ Internal Security Act, No. 74 of 1982, sect. 30.

42/ Ibid., sect. 2(1).

43/ Dugard, op. cit., p. 110.

44/ Geoffrey Bindman, South Africa and the rule of law, 1988, p. 90.

45/ South African Institute of Race Relations, Survey of race relations in South Africa, 1987/88, p. 774.

46/ See, e.g., Ley de caducidad de la pretensión punitiva del estado, Law No. 15,848, 1986.

47/ Amnesty International, Philippines: unlawful killings by military and paramilitary forces, AI Index ASA/35/02/88, p. 11.

48/ Legislative Assembly of El Salvador, Decree No. 805 of 28 October 1987, article 1.

49/ Código Penal, article 376.

50/ Ibid., article 400.

51/ Ibid., article 400 (50).

52/ Legislative Assembly of El Salvador, Decree No. 805, article 2.

53/ The provision was primarily aimed at granting amnesty to participants in government-backed death squads, which normally operated in large groups. The provision in practice did not extend to government opponents since they were almost always charged with "pure" political crimes, such as subversion. The extension of amnesty by this provision to death squads was challenged in the courts. When the challenge failed, United States human rights and refugee groups brought a petition to the Inter-American Court. The petition related in particular to a massacre in Las Hojas in 1983. The case is still pending.

54/ One exception is stated: those involved in the assassination of Archbishop Oscar Romero are excluded from the amnesty. Article 3(1).

55/ "Granting of amnesty to certain persons", Proclamation No. AG 13 (1989), Official Gazette, No. 5725 of 7 June 1989.

56/ Ibid., sect. 2(1).

57/ Sects. 28, 29, 31 and 50 of the Internal Security Act and sect. 3(1) of the state of emergency regulations.

58/ Statement by Claude Pilloud on the protection of political detainees to the American Society of International Law's Panel on Humanitarian Problems and International Law, mimeograph, 15 October 1970, as quoted in Forsythe, "Political prisoners: the law and politics of protection", 9 Vanderbilt Journal of Transnational Law, 295, 1976, p. 320.

59/ No. 74 of 1982.

60/ Sect. 54(2).

61/ Sect. 56(1) (a).

62/ Sect. 56(1) (b) and (c).

63/ Sect. 55.

64/ Sect. 56(1) (d) to (p).

65/ Sect. 57.

66/ Sect. 59.

67/ No. 72 of 1982.

68/ See, generally, Van den Wijngaert, The political offense exception to extradition, pp. 108-111.

69/ See the decision of Professor Norgaard to release as political prisoners five students convicted of public violence arising out of a school boycott at Walvis Bay.

70/ Silas Mbonge application.

71/ Eino Mule and Haidula Andreas application. A final determination of their status, however, has been postponed until after they are tried.

72/ Andreas Vilho application.

73/ See In re Castioni, op. cit.; Schtraks, op. cit. and Quinn vs. Robinson, op. cit.

74/ Application of Angula Mwaala.

75/ See Devoy, op. cit.

76/ Nelson Mandela and eight other accused in the Rivonia Trial were tried under the General Law Amendment Act and the Suppression of Communism Act for sabotage and conspiracy to overthrow the Government by revolution and by assisting an armed invasion of South Africa by foreign troops.

77/ Sect. 54(1).

78/ Sect. 54(2).

79/ Sect. 54(3).

80/ Sect. 54(4).

81/ Sect. 54(7).

82/ No. 75 of 1969.

83/ No. 26 of 1956.

84/ In 1982 and 1983, ICRC visited 415 and 375 political prisoners in South Africa. J. D. Armstrong, "The International Committee of the Red Cross", International Organization, vol. 39, No. 4 (1985), p. 636. See also David P. Forsythe, Humanitarian politics, 1977, pp. 62 and 66.

85/ Protocol Addition to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature on 12 December 1977, 16 International Legal Materials, 1391, 1977 (hereinafter Protocol I).

86/ Under article 1(4), Protocol I applies specifically to peoples "fighting against colonial domination and alien occupation and against racist régimes ... " A leading authority and member of the United States delegation to the diplomatic conferences that drafted the Protocol confirmed that the references to "colonial domination" and "racist régimes" were directed essentially at southern Africa -- to South Africa, Namibia, Southern Rhodesia and the Portuguese colonies. Baxter, "Humanitarian law or humanitarian politics? The 1974 Diplomatic Conference on humanitarian law", 16 Harvard International Law Journal, 1 December 1975.

Courtesy of Notes and Documents

